85-1572

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

ROBERT E. LEE,
Petitioner,

v.

THE STATE OF GEORGIA
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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ROBERT E. LEE, Petitioner

v.

THE STATE OF GEORGIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioner, Robert E. Lee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Georgia Court of Appeals entered in this proceeding on November 4, 1985.

Questions Presented for Review

1. Whether a state may consistent with due process of law required by the Fourteenth Amendment to the United States Constitution, use evidence of the refusal of a suspect, arrested for the offense of Driving Under the Influence of Alcohol, to submit to chemical testing of his blood when the suspect was not lawfully given an advice of his implied consent rights in accordance with the applicable state statute.

2. Whether petitioner has been denied a fair and impartial appellate review by the Court of Appeals of Georgia.

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Opinion Below

The opinion of the Court of Appeals of Georgia entered on November 4, 1985 is appended hereto as appendix A.

Jurisdiction

The opinion sought to be reviewed was made and entered on November 4, 1985 in the Court of Appeals of Georgia. A motion for rehearing was filed on November 13, 1985 and was denied on November 20, 1985. Petition for certiorari was filed in the Supreme Court of Georgia on December 9, 1985 and was denied on January 8, 1986. A motion for rehearing was filed in the Supreme Court of Georgia on January 21, 1986 and was denied on January 28, 1986.

The Supreme Court of the United States has jurisdiction to review the judgment of the Court of Appeals of Georgia by virtue of 28 U.S.C. Sect. 1257(3).

Constitutional Provisions Involved

Amendment XIV, United States Constitution, Section 1, clause 2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On September 17, 1984, petitioner was involved in an automobile collision. Petitioner was placed under arrest at the scene of the collision for Driving Under the Influence of Alcohol. At the time of his physical arrest, petitioner was not given his implied consent warnings as required by O.C.G.A. Sec. 40-6-392 (a) (4).

Petitioner was taken to a local hospital for treatment of a head laceration. He was conscious, alert and rational at all times during the incident. The arresting officer did not advise petitioner of his implied consent warnings until after petitioner was at the hospital some thirty minutes after the arrest.

At the hospital petitioner stated that he would not take any test until he had a chance to speak to his attorney. The arresting officer filled out a refusal slip for petitioner.

Prior to trial, petitioner filed a motion in limine to exclude the arresting officer's testimony as to a refusal to submit to chemical testing of his blood on the ground that the arresting officer had failed to comply with the requirements of O.C.G.A. Sec. 40-6-392 (a) (4).

O.C.G.A. Sec. 40-6-392 (a) (4) provides that "An arresting officer at the time of the arrest shall advise the person arrested of his rights to a chemical test or tests according to this code section."

In construing this code section the Supreme Court of Georgia had previously ruled that the wording "at the time of arrest" was mandatory and not directory. Perano v. State, 250 Ga. 704, 708, 300 S.E. 2d 668 (1983) In the Perano decision, the Supreme Court of Georgia carved out a limited exception for cases in which advising an accused of his rights at the precise time of his physical arrest would not enable the accused to make an intelligent choice concerning the state's request and his right to undergo an independent test. At no time was petitioner unable to understand his rights or unable to make an intelligent choice during the incident in question.

At trial the arresting officer testified that he was not prevented by petitioner from giving him his rights but he thought it would be more convenient to do it at the hospital. (T-36, 37)

The trial court ruled that the advice of rights was given as close to the point of arrest as circumstances would permit. (T-56)

In view of the testimony of the arresting officer, it is contended that this ruling was clearly erroneous.

Evidence of petitioner's refusal to submit to chemical testing of his blood was allowed to go to the jury. There was substantial evidence of petitioner's innocence, and after several hours of deliberation the trial judge gave the jury a dynamite charge. Following the giving of the dynamite charge the jury convicted petitioner of Driving Under the Influence of Alcohol.

Petitioner preserved this point for appeal in his fourth enumeration of errors to the Georgia Court of Appeals.

The Court of Appeals of Georgia in its November 4, 1985 opinion correctly stated that the evidence of petitioner's refusal should have been excluded if the advice of rights was not given to petitioner at the earliest time at or after the arrest, when it would be meaningful, and defendant could make an intelligent choice.

Petitioner contends that he has not been given a fair and impartial appellate review of his case in that the Court of Appeals of Georgia acknowledged the admssion of the arresting officer, stated that it would not suffice to allow the officer to give petitioner his rights at his own convenience, and proceeded to offer speculative reasons

as to why a delay might have been justified in the case. (Appendix A, p. ii, iii, iv)

Petitioner is entitled to the benefit of the evidence developed in his behalf during the trial, and it is inappropriate for an appellate court to ground an opinion on speculation when there is concrete and direct evidence to the contrary in the case before it.

Argument

The Georgia Legislature enacted a procedural safeguard for petitioner when it enacted O.C.G.A. Sec. 40-6-392 (a) (4). The arresting officer arbitrarily denied petitioner his timely advice of rights pursuant to this code section.

The applicable law and the violation has been brought to the attention of the trial court and the appellate courts of Georgia.

The trial court's ruling was clearly erroneous. There is a built-in bias on the part of the appellate courts to uphold the trial court. However, the court's rulings have deprived petitioner of his due process of law in this case.

A fundamental notion of due process reaching as far back as the Magna Charta is one that a fair trial is a trial that is held in accordance with the law of the land. Howard, Magna Charta, Text and Commentary, p. 43, 1964, Duncan v. Louisiana, 391 U.S., 145, 169, 20 L.Ed. 2d 491, 88 S. Ct. 1444 (1967)

The appellate review safeguard has also been denied to petitioner. It is entirely inappropriate for the Court of Appeals of Georgia to offer speculative reasons justifying the police officer's delay in giving petitioner his rights in the face of the arresting officer's straightforward admission that nothing the petitioner did prevented him from giving his his rights at the time of the arrest, and that it was his own choice to delay in giving the rights until a later time at the hospital.

Petitioner is entitled to the benefit of the law of Georgia, enacted to protect his rights. He is entitled to the benefit of the evidence developed on his behalf during the trial of his case. Petitioner has been denied both of these rights and fundamental due process of law. The Supreme Court of the United States should grant certiorari

in this case, and correct this unjust denial of petitioner's due process rights.

Respectfully submitted,

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APPENDIX A ATTACHED TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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IN THE COURT OF APPEALS OF GEORGIA

70917. LEE V. STATE

November 4, 1985

BEASLEY, Judge

The defendant appeals his conviction of driving under the influence of alcohol.

3. The defendant was charged as a result of an incident at approximately 4:20 a.m. September 18, 1984, when the vehicle he was driving struck the rear of another vehicle, causing extensive damage to both. In less than 5 minutes a police officer arrived at the scene and found the defendant with a strong odor of alcoholic beverage about him, and bleeding from a severe cut on his forehead. The officer radioed for help, and an emergency unit arrived shortly thereafter. The defendant was given first aid and because of his high blood pressure, was taken to the hospital. There his cuts were stitched in the emergency room. After having taken the statements of the driver of the other vehicle and the defendant and having observed the defendant's behavior, the officer informed the defendant he was under arrest and charged with driving under the influence of alcohol or drugs.

The officer testified that the defendant was in the emergency vehicle being administered to and preparatory to being carried to the hospital, and the officer "thought it best" if he waited until they arrived at the hospital before reading to defendant his "implied consent" rights. He stated it was his decision and defendant did nothing to prevent the reading of his rights. The officer related on cross-examination that he "thought it would be more convenient at the hospital."

After arriving at the hospital, the officer read to defendant his rights under O.C.G.A. Sections 40-5-55 and 40-6-392. The defendant refused to submit to a test. The officer re-read the "implied consent" form to the defendant, and again received a negative response. The defendant further stated "he wasn't going to do anything until he talked to his attorney." Thereafter, the officer issued two citations to defendant and filled out a "refusal slip" and forwarded it to the Department of Public Safety.

Prior to trial defendant filed a motion in limine seeking to exclude from evidence the fact that defendant refused to permit a chemical analysis of his bodily substance to be made. Such refusal is specifically made admissible under O.C.G.A. Sec. 40-6-392 (c). After a hearing, the motion was overruled and defendant asserts as error that ruling as well as the admission into evidence, during trial, of his refusal.

O.C.G.A. Sec. 40-6-392 (a) (4) provides in part: "The arresting officer at the time of the arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section." Therefore, defendant contends since he was not informed at the time of his arrest, evidence of his refusal to submit to a chemical test should have been excluded.

Were this a case of first impression it would appear that there could be no error harmful to defendant unless the information regarding his rights was not supplied to defendant prior to the test being administered to him. However, such is not the situation. In Perano v. State, 250 Ga. 704 (300 SE 2d 668) (1983), the Supreme Court in answer to our certified questions has interpreted the statutory requirement. Instead of adopting a bright line test suggested by Chief Justice Hill[1] the court adopted a case-by-case approach observing that "at the time of arrest" cannot be interpreted to mean sometime in the future. Thus, under ordinary circumstances the advice should be given at the time of the arrest "or at a time as close in proximity to the instant of arrest as circumstances might warrant." There because a fight broke out during the arrest the Supreme Court found that it was "not inappropriate . . . for the officer to advise [the defendant] of this right at the hospital prior to the administration of the state's test." The court held that the penalty for not advising at the time of the arrest was the inadmissibility of the state-administered test and that the state could not use the accused's refusal as a basis

1. In the dissent Chief Justice Hill announced that he would hold that one need not be informed of the right to an additional test at the very time and scene of the physical arrest and that the requirements of O.C.G.A. Sec. 40-6-392 (a) (4) are substantially satisfied if a defendant is advised of his right to an additional test prior to choosing whether to refuse or undergo the state-administered test. Dissent: Perano v. State, 250 Ga. 704, 708.

to suspend his driver's license under O.C.G.A. Sec. 40-5-55(c). Perano, Id. at 708.

We interpret this to mean that the refusal here should be excluded if the advice was not given at the earliest time at or after arrest when it would be meaningful, and defendant could make an intelligent choice. Obviously, the decision as to when to advise the accused cannot be at the officer's unbridled discretion, and here the articulated thought of "convenience" by the officer would not suffice. However, there are several factors which might warrant the delay: the defendant was being treated for injury, having broken the windshield with his head, and was awaiting the trip to the hospital; he had just vomited; was dazed and nauseated; the officer was concerned and unsure about his condition; the officer decided to charge the defendant just before the ambulance was to leave for the hospital. The advice or warning was given to the defendant shortly after his arrival at the hospital. In context, the warning was given in close proximity to the arrest, and its timing was warranted by the circumstances. Hence, evidence of the refusal to submit to testing was admissible and this ground does not furnish a basis for reversal.

Judgment affirmed. Deen, P.J., and Pope, J., concur.

COURT OF APPEALS OF THE STATE OF GEORGIA
ATLANTA
November 20, 1985

The honorable Court of Appeals met pursuant to adjournment. The following order was passed:

70917 Robert E. Lee v. The State (Y-15820-2)

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
ATLANTA 1/8/86

Case No. 42998, Robt. E. Lee v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur except Smith & Bell, J.J., dissent.
Very truly yours,
Joline B. Williams, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
ATLANTA, 1/28/86

November 20, 1985

The motion for rehearing was denied today:
Case No 42998, Lee v. The State
Smith & Bell, J.J. dissent.
Yours very truly,
Mrs. Joline B. Williams, Clerk

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CERTIFICATE OF SERVICE

I, William R. Ritchie, attorney for the petitioner herein, do certify that I have on this date served a copy of the within and foregoing petition for certiorari and appendix A upon the attorney for the respondent, Ms. Nancy Jackson, Assistant Solicitor for DeKalb County, Georgia, Room 500, DeKalb County Courthouse, Decatur, Georgia 30030, by depositing a copy of the same in the United States mail with adequate postage affixed thereto.

This 24 day of March, 1986.

William R. Ritchie

William R. Ritchie
Attorney for Petitioner